LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
APR 11 1968
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1967

No. 1308

CORLISS LAMONT, on behalf of himself and all others similarly situated,

Petitioner,

against

COMMISSIONER OF MOTOR VEHICLES and R. L. POLK & CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
30 East 42nd Street,
New York, New York 10017,
Attorneys for Petitioner.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ	6
I. Section 202(3) of the New York Vehicle and Traffic Law violates petitioner's right of privacy and freedom of speech guaranteed by the Constitution	6
II. The courts below employed an erroneous standard in deciding that the complaint did not require the convening of a three-judge court	10
CONCLUSION	12
APPENDIX:	
New York Vehicle and Traffic Law	13
Opinion of the Court of Appeals	15
Judgment of United States Court of Appeals	17
Opinion of District Court	18

CITATIONS

Cases

	PAGE
Abrams v. United States, 250 U.S. 616	9
Bailey v. Patterson, 369 U.S. 31	11
Bates v. City of Little Rock, 361 U.S. 516	8
Berger v. New York, 388 U.S. 41	6
Boyd v. United States, 116 U.S. 616	8
Breard v. Alexandria, 341 U.S. 622	8
Camara v. Municipal Court of San Francisco, 387 U.S. 523	8
Chapin v. Tynan, No. 150994, Superior Court, Hartford Co. 1967	10
Cox v. Louisiana, 379 U.S. 536	9
Griffin v. Illinois, 351 U.S. 12	9
Harper v. Virginia Board of Elections, 383 U.S. 663	9
Harrell v. Board of Commissioners of District of Columbia, 269 F. Supp. 919 (D.D.C. 1967)	12
Katz v. United States, 389 U.S. 347	7
Lamont v. Postmaster General, 381 U.S. 301	9
McDonald v. United States, 335 U.S. 451	7
Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105	9
NAACP v. Alabama, 377 U.S. 288	8

PAGE

(CASES, CONT'D)

People v. Harnett, 131 Misc. 75, *aff'd* 224 App. Div. 127, *aff'd* 249 N.Y. 606 (1928) 3

Public Utilities Commission v. Pollak, 343 U.S. 451 8

Reed Enterprises v. Corcoran, 354 F. 2d 519 (D.C. Cir. 1965) 12

Savings and Loan Association v. Topeka, 20 Wall 665 9

Stamler v. Willis, 371 F. 2d 413 (7th Cir. 1966) 12

Sweezy v. New Hampshire, 354 U.S. 234 8

Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967) 12

Constitutional Provisions and Statutes

CONSTITUTION OF THE UNITED STATES:

First Amendment 2, 5, 6, 8

Fourth Amendment 2, 5, 7

Fifth Amendment 5

Ninth Amendment 5

Fourteenth Amendment 2, 5, 8

STATUTES:

New York Vehicle and Traffic Law,

Section 202(3) 2, 3, 5

Section 401 ..... 2, 3

Section 401(2) 3

Miscellaneous Materials

Westin, *Privacy and Freedom* (1967) 6, 7

Supreme Court of the United States

October Term, 1967

No.

CORLISS LAMONT, on behalf of himself and all others similarly situated,

Petitioner,

against

COMMISSIONER OF MOTOR VEHICLES and R. L. POLK & CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered herein on December 12, 1967.

Opinions Below

The *per curiam* opinion of the Court of Appeals, as yet unreported, appears in the Appendix, *infra*, pp. 15-16. The opinion of the District Court is reported at 269 F. Supp. 880 and appears in the Appendix, *infra*, pp. 18-24.

Jurisdiction

The judgment of the Court of Appeals was entered on December 12, 1967 and appears in the Appendix, *infra*, p. 17. By order of Mr. Justice Harlan, dated March 4, 1968, petitioner's time to file this petition was extended to April 11, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether Section 202(3) of the New York Vehicle and Traffic Law:

(a) violates the First and Fourteenth Amendments' guarantee of freedom of speech by giving the respondent R. L. Polk & Co. preferential means of communication with the public;

(b) violates petitioner's right of privacy and his right to due process under the Fourth and Fourteenth Amendments by the State's delivery to Polk, for its private use, of information given to the State for a public purpose.

2. Whether the courts below employed an erroneous standard in refusing to convene a three-judge court.

Statutes Involved

This case involves the constitutionality of § 202(3) of the New York Vehicle and Traffic Law which reads, in pertinent part, as follows:

> The commissioner may, in his discretion, contract with the highest responsible bidder to furnish copies of records of all vehicle registrations for any registration period, or number of periods not exceeding five years in the aggregate, with respect to a given territory. In such event, the fees provided by this section shall not apply to copies of records furnished under any such contract.

The entire § 202(3) and the pertinent part of § 401 of the same law are set forth in the Appendix, *infra*, pp. 13-14.

Statement of the Case

Petitioner brought this action on behalf of himself and all other owners of motor vehicles registered under the New York Vehicle and Traffic Law, § 401, to enjoin as unconstitutional the operation of § 202(3) of the same law; pursuant to which New York microfilms and sells to the highest bidder for its private use all the data filed by automobile registrants as a condition to the use of their vehicles.

All New York owners of vehicles used on the public highways register their vehicles, by paying a fee and completing a form calling for the owner's name, address, employer's name and address, date of birth, sex, insurance data, description of vehicle and whether the owner has been convicted of certain criminal offenses. On new registration forms the Social Security number and the Employer's Identification number must be included. This information is kept by the Commissioner, who is not authorized to make the registration book available for public inspection generally. Vehicle and Traffic Law, § 401(2). A member of the public, however, may obtain information about an individual registrant upon payment of a statutory fee but only upon a showing of proper purpose or interest. *Cf. People* v. *Harnett,* 131 Misc. 75, *aff'd* 224 App. Div. 127, *aff'd* 249 N.Y. 606 (1928).

New York Vehicle and Traffic Law, § 202(3) creates an exception to this scheme by authorizing the Commissioner to furnish to the highest bidder a list of persons whose vehicles are thus registered. Pursuant to § 202(3), the State complies lists of three different types of registrations: dealer and transport registrations, special registrations, and ordinary automobile registrations. It reproduces the automobile registration applications on 35 millimeter microfilm rolls and furnishes these rolls to the selected purchaser.

The State agrees to furnish the films only to the selected purchaser who has exclusive possession of them until a specified time when he must return them to the State. The purchaser is free, if it wishes, to reproduce the lists and microfilms and to sell them to whomever he pleases. He is specifically authorized to utilize the information for the purpose of making compilations and to use such compilations in his business as he sees fit. [Contract between Commissioner of Motor Vehicles and R. L. Polk and Co. (R. 33-45).][1]

Respondent, R. L. Polk & Co., frequently has been and is currently the chosen purchaser of the New York State records. Polk is engaged in a highly sophisticated and far-flung marketing operation. It boasts of having the world's largest "Selective Circulation List" which provides a computerized breakdown of millions of individuals in terms of their likelihood of buying certain products and in certain price ranges; it publishes city directories compiled from door-to-door interviews throughout America; it provides a bank directory listing information on every known bank in the world; it conducts wide-scale house-to-house selling and public-relations campaigns for various industries, and it undertakes comprehensive mail advertising campaigns for its clients (R. 26-29).

The Motor Statistical and Motor List Division, directly involved herein, purports to account for every registered new vehicle buyer and every registered owner in all the cities, towns and rural areas of the United States, a task it does so well that the automotive industry enjoys the advantages of having the most clearly defined and accessible market information of all industries. It is the only industry that knows *who* buys its and its competitors' products *when and what they buy* and *where* the buyers can be reached by name and address (R. 27). This is effectuated

[1] "R" refers to the record in the District Court.

by computer processing of data on each and every motor vehicle owner. By counting, selecting, screening and interpreting, Polk provides for its clients an enormous potential market where individual owners and susceptible buyers can readily be contacted by unsolicited mail, telephone and home interview. Often the solicitation is done by Polk directly; other times by dealers who purchase or lease the information gathered by Polk.

Petitioner brought this action to declare § 202(3) unconstitutional and to enjoin its enforcement on the ground that it authorizes a joint campaign, in which the State is an essential participant, of commercial propaganda and unwanted intrusions into the home. Petitioner alleged that the State and Polk have acted in concert to compel his audience for commercial propaganda and invade his privacy, and that § 202(3), authorizing this invasion, is repugnant to the First, Fourth, Fifth, Ninth and Fourteenth Amendments of the Constitution.

The district court granted the Commissioner's motion to dismiss the complaint and denied petitioner's motion for a three-judge court. It stated that, in its view, petitioner's contentions had little chance of success, not being "arguably sufficient to warrant full-scale consideration in the Supreme Court on an appeal as of right from a three-judge district court", *infra*, p. 23. It added that the consequences of error on its part in refusing to convene a three-judge court "is at most to postpone invalidation of the State's law. And that, in the circumstances of this case, is a bearable possibility", *infra*, p. 23. The Court of Appeals affirmed "for substantially the reasons contained in the opinion of Judge Frankel below", *infra*, p. 16.

REASONS FOR GRANTING THE WRIT

I

Section 202(3) of the New York Vehicle and Traffic Law violates petitioner's right of privacy and freedom of speech guaranteed by the Constitution.

1. The New York statute combines a violation of First Amendment rights with an impairment of petitioner's right of privacy. The impact of computers on record-keeping systems has been to destroy practical boundaries of privacy much as electronics surveillance devices have destroyed the boundaries of door and wall; *cf. Berger* v. *New York,* 388 U.S. 41; see generally Westin, *Privacy and Freedom* (1967). The sudden mushrooming of electronic data processing during the past few years and its inevitable growth in the future create new and disturbing problems in the handling of public records. Until recent years access to motor vehicle registration records was of importance to the public principally for identification of automobiles which were involved in accidents. Broader use was limited by the sheer impossibility of manipulating a large volume of data. Thus the value of registration information was fairly restricted to legitimate inquiries relating to the use of automobiles. The use of electronic data processing for the benefit of a single purchaser has totally changed this situation. The data is now available for a purpose unrelated to the reasons for the registration. If permitted here, the contents of other public records, heretofore available only upon laborious personal inquiry, will be accessible at a push of a button, releasing a terrifying array of personal information.

The automobile registration data, vis-a-vis the Department of Motor Vehicles, is innocuous. The Department is entitled to know the registrant's name, address, age, employer, and descriptive details of his automobile and

insurance. But what is of no particular sensitivity in the hands of public officials may well have a different aspect in the hands of private persons. This is particularly true where those private persons are engaged in the business of collecting information concerning large numbers of citizens and presumably sorting and manipulating it on their own computers.

The phenomenon of the State selling dossiers to private commercial firms is a glaring misuse of public records and an invasion of the privacy of the citizen. When the data may be combined with information from other sources, digested and disgorged in a multitude of permutations for uses beyond the power of the State to control, then any semblance of anonymity is lost.

We have entered the first stage of the era of "data surveillance", Westin, *supra*, at 158. The process is subject to the Fourth Amendment's guarantee of privacy, "one of the unique values of our civilization", *McDonald* v. *United States*, 335 U.S. 451, 453. The citizen is entitled to privacy not only in his home, but in every reasonable area of his life; see *Katz* v. *United States*, 389 U.S. 347. Those areas include public records to the extent necessary to protect against oppressive intrusion. It is imperative that appropriate standards be set if the citizen is not to become the victim of the machine.

2. The present case presents no overriding state interests which justify any intrusion into petitioner's privacy. The District Court was over-generous in stating that Section 202 "may not be the most inspired kind of government function", *infra*, p. 22. The statute was not enacted in an effort to promote the health, welfare or security of the people of New York. It is doubtful whether the State's token income comprises even "a small source of much needed revenue", *infra*, p. 22, in view of the substantial microfilm costs to the state. In any event, much more sub-

stantial interests have been held to be "insufficient to justify so substantial a weakening of the Fourth Amendment's protection", *Camara* v. *Municipal Court of San Francisco,* 387 U.S. 523, 534. On the other side of the scale, there is the right of individual and group privacy—*i.e.,* the right of the citizen to determine to what extent information about himself is to be communicated to others by the government. *Cf. Bates* v. *City of Little Rock,* 361 U.S. 516; *NAACP* v. *Alabama,* 377 U.S. 288. There is the right to be free of needless and unwanted intrusions in the home which are reflected in this Court's approval of the statutory ban on commercial door-to-door solicitation in *Breard* v. *Alexandria,* 341 U.S. 622, 640.

3. The instant case directly poses the meaning of this Court's decision in *Public Utilities Commission* v. *Pollak,* 343 U.S. 451. The District Court read this case as containing "important implications" against the petitioner, *infra,* p. 21. We read it as a recognition of the right of "privacy to which he is entitled in his own home", *supra* at p. 464, in contrast to the right of the "passenger on the public vehicle". See also the opinion of Mr. Justice Black explicitly setting forth a different view where more than music is involved, 343 U.S. at 466. The constitutional right of privacy is not lost because the data does not contain "intimate" facts since the right of privacy is not dependent upon the nature of the data sold by the government to a particular business. Hence the warning that "in these matters of spirit inroads on legitmacy must be resisted at their incipiency", *Sweezy* v. *New Hampshire,* 354 U.S. 234, 263-4. See also *Boyd* v. *United States,* 116 U.S. 616.

4. This case poses an additional important issue under the First and Fourteenth Amendments never decided by this Court—whether a state has a right to grant a particular business concern a monopoly of communication with a large sector of the public. New York has admittedly given

this preferential treatment to respondent Polk by giving it exclusive access to all the relevant data of automobile registrants in the State of New York. This statutory monopoly violates the state's duty of neutrality in matters of speech. It is the antithesis of a "free trade in ideas" (Mr. Justice Holmes dissenting in *Abrams* v. *United States,* 250 U.S. 616, 630). Since the monopoly is predicated upon successful bidding, the statute has the additional constitutional defect of violating the principle that "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way", *Murdock* v. *Commonwealth of Pennsylvania,* 319 U.S. 105, 111. That the governing consideration is Polk's financial ability only underscores the unconstitutionality of the preference. See *Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 666; *Griffin* v. *Illinois,* 351 U.S. 12, 23.

5. The statute conflicts with this Court's view that "[i]t is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups . . . by use of a statute providing a system of broad discriminatory licensing power", *Cox* v. *Louisiana,* 379 U.S. 536, 557. In *Lamont* v. *Postmaster General,* 381 U.S. 301, this Court struck down a statute in which the federal government discouraged the delivery to the public of certain types of mail. The instant case involves the corollary principle that the state may not encourage distribution of propaganda which it favors.

6. The State's use of public facilities for the benefit of a particular private enterprise raises a most important question of due process, namely whether public facilities may constitutionally be used "in aid of the enterprise of others which are not of a public character", see *Savings and Loan Association* v. *Topeka,* 20 Wall. 655, 659. While

there are no direct precedents, it would seem most doubtful that any government, state or federal can constitutionally divert its resource for the benefit of a favored business enterprise.

The problem is a large one, as indicated by the fact that "eighteen other States appear to have adopted similar practices", *infra*, p. 22. At least one other lawsuit raising the same issue is presently pending in a state court, *Chapin* v. *Tynan*, No. 150994, Superior Court, Hartford Co. (1967). In view of the public opposition which these statutes have aroused, they are certain to give rise to repeated litigation until the issue is resolved by the court. In addition, the implications of the statute and of the decisions below have ramifications which extend to virtually all governmental systems of registration in a variety of contexts. It is important that this Court determine whether such information filed for a governmental purpose can constitutionally be sold to and used by a single private enterprise.

II

The courts below employed an erroneous standard in deciding that the complaint did not require the convening of a three-judge court.

1. Petitioner's claim arises upon a clean slate and poses the constitutionality of a novel statute of a type never considered by this Court. In such a case the single judge's role is limited to ascertaining whether the issues are arguable or, in the court's own language, "fairly open to debate." Argument on the merits must be had before a three-judge district court. Any other standard not only merges the jurisdictional and substantive issues by ineluctably thrusting the single judge deep into the merits, but does so at a wholly inappropriate stage of the proceeding. Such a threshold decision is made on the basis of the com-

plaint, an inadequate vehicle for the development of thorough constitutional argument. This is especially so where the claim, as here, entails unprecedented and rather intricate constitutional issues.

2. The District Court was in error in suggesting that its task was "to decide only whether the contention has some plausible chance of success, arguably sufficient to warrant full-scale consideration in the Supreme Court on an appeal as of right from a three-judge district court", *infra*, pp. 22-33. There is a large difference between deciding whether an issue is open to debate and whether its chances of success are sufficient to warrant this Court's review.

3. The standard used in this case entails a decision indistinguishable from a decision on the merits of the constitutional claim. Thus, the District Court disposed of the complaint because, in its view, "plaintiff proposes to stretch the constitutional dimensions of 'privacy' far beyond any reasonable foreseeable limits the court ought to enforce", *infra*, p. 22. Recognizing that it was departing from the customary standard for determining substantiality, it added that "[p]erhaps 'unsubstantiality' need not be so plain when a single judge dismisses as it should probably be when a single judge finds the *defense of constitutionality* frivolous (*Bailey* v. *Patterson, supra*) and then enjoins enforcement of the state statute", *infra*, p. 23. It found consolation in the fact that in the former case "the normally less major consequence of error is at most to postpone invalidation of the State's law." *Ibid.*

4. The statutory scheme was meant to provide speedy, authoritative resolution of the constitutional issues for the benefit of the complainant as well as of the state. This Court's decision in *Bailey* v. *Patterson*, 369 U.S. 31, does not support a dual standard of substantiality. Current

hostility to three-judge court litigation produces such anomalies as the failure of one district judge to convene a three-judge court on the ground that the constitutional question was not "substantial", *Harrell* v. *Board of Commissioners of District of Columbia,* 269 F. Supp. 919 (D.D.C. 1967) three days after another three-judge district court held an identical statute to be unconstitutional, *Thompson* v. *Shapiro,* 270 F. Supp. 331 (D. Conn. 1967). Such results are not productive of respect for the judicial process. District judges should be required to adhere to the test laid down by this Court, and to convene three-judge courts where, as here, the constitutional questions raised are not "frivolous" or "plainly unsubstantial". See, *e.g., Reed Enterprises* v. *Corcoran,* 354 F. 2d 519 (D.C. Cir. 1965); *Stamler* v. *Willis,* 371 F. 2d 413 (7th Cir. 1966).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

LEONARD B. BOUDIN,
VICTOR RABINOWITZ,
30 East 42nd Street,
New York, New York 10017,
Attorneys for Petitioner.

April 10, 1968

APPENDIX

New York Vehicle and Traffic Law

§ 202. Fees for Searches and Copies of Records and Documents.

* * *

3. Fees for copies of records and documents. The fees for copies of records and documents, other than accident reports, shall be as follows: Written or typewritten copies, twenty-five cents per folio, with a minimum of one dollar. Negative photostatic copies, fifty cents per page not exceeding twenty-four square inches in area and one dollar per page in all other cases. The fee for a positive photostatic copy shall be double the fee for a negative photostatic copy. The fee for a negative photostatic copy of an accident report shall be two dollars. The fee for a positive copy of such a report shall be three dollars and fifty cents. If certification of a copy of a record or document is required, there shall be an additional fee of fifty cents.

The commissioner may, in his discretion, contract with the highest responsible bidder to furnish copies of records of all vehicle registrations for any registration period, or number of periods not exceeding five years in the aggregate, with respect to a given territory. In such event, the fees provided by this section shall not apply to copies of records furnished under any such contract.

§ 401. Registration of Motor Vehicles; Fees; Renewals.

1. Registration by owners. a. No motor vehicle shall be operated or driven upon the public highways of this state without first being registered in accordance with the provisions of this article, except as otherwise expressly provided in this chapter.

b. Every owner of a motor vehicle which shall be operated or driven upon the public highways of this state shall, except as otherwise expressly provided, cause to be presented, by mail or otherwise, to the office or a branch office of the commissioner, or to any agent of the commissioner, constituted as provided in this chapter, an application for registration addressed to the commissioner, and on a blank to be prepared under the direction of and furnished by the commissioner for that purpose, containing: (a) a brief description of the motor vehicle to be registered, including the name and factory number of such vehicle, and such other facts as the commissioner shall require;

2. Registration record. Upon the receipt of a sufficient application for registration of a motor vehicle or trailer, as provided in this article, the commissioner, or the agent receiving it, shall register such motor vehicle or trailer and maintain a record of the registration of such vehicle under the distinctive number assigned to such motor vehicle or trailer as provided in this section, and the information in such record may be obtained upon payment of the fees specified in section two hundred two of this chapter.

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 205—September Term, 1967

(Argued November 28, 1967 Decided Dec. 12, 1967)

Docket No. 31595

—o—

CORLISS LAMONT, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

—against—

COMMISSIONER OF MOTOR VEHICLES and R. L. POLK & Co.,

Defendants-Appellees.

—o—

Before:

Moore, Smith and Hays, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Marvin E. Frankel, *Judge,* denying appellant's motion to convene a three-judge court and granting appellees' motion to dismiss

the complaint. Opinion below reported at 269 F. Supp. 880. Affirmed.

Leonard Boudin, New York, N. Y. (Rabinowitz and Boudin; Victor Rabinowitz, David Rein, and Joan Goldberg, New York, N. Y., of counsel), for plaintiff-appellant.

Mortimer Sattler, New York, N. Y. (Louis J. Lefkowitz, Attorney General of the State of New York; Samuel A. Hirshowitz, First Assistant Attorney General, and Joel Lewittes, New York, N. Y., of counsel), for defendant-appellee, Commissioner of Motor Vehicles.

Wyllys S. Newcomb, New York, N. Y. (Royall, Koegel, Rogers & Wells; John M. O'Hara and Guy C. Quinlan, New York, N. Y., of counsel), for defendant-appellee, R. L. Polk & Co.

Per Curiam

We affirm for substantially the reasons contained in the opinion of Judge Frankel below, reported at 269 F. Supp. 880 (S.D. N.Y. 1967).

Judgment of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of December one thousand nine hundred and sixty-seven.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

CORLISS LAMONT, on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

COMMISSIONER OF MOTOR VEHICLES and R. L. POLK & Co.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DAVID FUSARO,
Clerk.

Opinion of District Court

(R. pp. 67-75)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

FRANKEL, *D. J.*

Suing for himself "and all other owners of motor vehicles duly registered" in New York, plaintiff seeks declaratory and injunctive relief based upon the asserted unconstitutionality of N. Y. Vehicle and Traffic Law § 202(3), which provides that the Commissioner of Motor Vehicles

> "may, in his discretion, contract with the highest responsible bidder to furnish copies of records of all vehicle registrations for any registration period, or number of periods not exceeding five years in the aggregate, with respect to a given territory. In such event, the fees provided by this section [for searching and supplying copies of such records] shall not apply to copies of records furnished under any such contract."

The defendants are the Commissioner of Motor Vehicles and R. L. Polk & Co., which is said to be in the business, *inter alia,* of compiling directories and is alleged to have acquired the registration records as "the highest responsible bidder" under the statute. In addition to seeking a

declaration that §202(3) is unconstitutional under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments, along with an injunction "restraining the enforcement and operation" of the statute, plaintiff asks for a judgment of $10,000 against defendant Polk. The court's jurisdiction is said to rest upon 28 U.S.C. §§ 1331, 1343(3), 2201, 2202, 2281, and 2284; 42 U.S.C. § 1983; and the foregoing Amendments to the Federal Constitution.

Plaintiff has moved for the convening of a three-judge court under 28 U.S.C. §§ 2281 and 2284.[1] Defendants oppose the motion, urging that the asserted constitutional issue is "plainly unsubstantial," *Ex parte Poresky*, 290 U.S. 30, 32 (1933); cf. *Bailey* v. *Patterson*, 369 U.S. 31 (1962), and that the complaint should, accordingly, be dismissed by a single judge.

The allegations generating these opposing views—taken as true, of course, for present purposes—are: that plaintiff and others like him are compelled to register their motor vehicles with the Commissioner; that defendant Polk, having acquired the registration records, uses the names itself, or sells or leases the lists to others, "for the solicitation through the mails, by telephone and in person, of the registered owners of vehicles, for the purchase of merchandise;" and that the result has been "considerable annoyance, inconvenience and damage to the plaintiff and other registrants by reason of the large volume of advertising and crank mail and other solicitation to which they are subjected." Defendants' actions and the provisions of § 202 (3), the complaint concludes, "are in violation of the right of privacy of the plaintiff and other registrants, and constitutes [*sic*] deprivation of their liberty and property under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution."[2]

In support of the view that the constitutional issue he raises is sufficiently substantial to warrant the attention

of a three-judge court, plaintiff's able counsel presents written argument which reads in its entirety as follows:

> "The substantiality of the constitutional question raised by the complaint in this case is shown by the recent cases dealing with the sanctity of a man's home and the privacies of life. *Griswold* v. *Conn.*, 381 U.S. 479; *Mapp* v. *Ohio*, 367 U.S. 643; *Breard* v. *Alexandria*, 341 U.S. 622; *Public Utilities Comm'n* v. *Pollack* [*sic*], 343 U.S. 451; *Monroe* v. *Pape*, 365 U.S. 167; *Frank* v. *Maryland*, 359 U.S. 360; *Skinner* v. *Oklahoma*, 316 U.S. 535."[3]

To be sure, brevity, a somewhat rare delight in courthouses, is not to be discouraged by equating it with "unsubstantiality." It should also be observed that counsel argued engagingly, and at considerably greater length, in oral support of the view that expanding judicial concern for "the privacies of life" shows enough movement in the law to preclude dismissal of his complaint as frivolous. In the end, however, plaintiff's single sentence of written argument, followed by the citation of seven cases, among which one hurts him and six are inapposite, may fairly be taken as the legal measure of his novel claim.

It would be pedantic to linger over the many distinctions between this case and those involving searches and seizures (*Mapp* v. *Ohio, supra; Monroe* v. *Pape, supra;* cf. *Frank* v. *Maryland, supra*[4]), the sanctity of the marital relationship (*Griswold* v. *Connecticut, supra*), the power of States to *limit* solicitation (*Breard* v. *Alexandria, supra*), and laws for compulsory sterilization (*Skinner* v. *Oklahoma, supra*). The citation closest to the mark in plaintiff's list is *Public Utilities Comm'n* v. *Pollak,* and that is adverse to him. There, the dispute was over governmental approval of radio broadcasts, including commercial messages, to the captive

audiences in publicly franchised buses and street cars. The intrusive assault upon the privacy and serenity of unwilling listeners forced to use public conveyances was so jangling to one normally hardy "victim" on the Supreme Court that he found himself unable to rule dispassionately upon the constitutional issue. 343 U.S. at 466-67 (FRANKFURTER, *J.*). The Court majority pointedly recorded (p. 465) its expression of "no opinion as to the desirability of radio programs in public vehicles." The Court then proceeded, however, to reject the claim that the outraged listeners could invoke the right of privacy or other constitutionally protected interests to shut out the radio broadcasts. Mr. Justice Black dissented in part on grounds that give little or no comfort to the plaintiff in this case. The dissent of Mr. Justice Douglas, centering on the right of privacy, distinguished "the man on the streetcar," forced to hear the broadcasts, from the person at home who is free to turn off or away from an offensive program. *Id.* at 469.

Strictly speaking, that decision is not squarely in point. It contains important implications, however, that lead *a fortiori* to the defeat of this plaintiff's claim. There is no captive quality in the plight of which plaintiff complains. The mail box, however noxious its advertising contents often seem to judges as well as other poeple, is hardly the kind of enclave that requires constitutional defense to protect "the privacies of life." The short, though regular, journey from mail box to trash can—for the contents of which the State chooses to pay the freight when it facilitates the distribution of trash—is an acceptable burden, at least so far as the Constitution is concerned. And the bells at the door and on the telephone, though their ring is a more imperious nuisance than the mailman's tidings, accomplish more peripheral assaults than the blare of an inescapable radio.

The information sold by the Commissioner is not vital or intimate. It is, moreover, in the category of "public records," available to anyone upon demand. See Vehicle and Traffic Law § 401(2). Indeed, questions more troublesome than plaintiff's might arise if the State adopted a policy of "privacy" or "secrecy" with respect to such information.[5] What the State has done in practical effect is to tap a small source of much-needed revenue by offering a convenient "packaging" service. This may not be the most inspired kind of government function, although it may be noted that eighteen other States appear to have adopted similar practices.[6] The point of importance, whatever aesthetic or other judgments might be prompted by this activity, is that it reflects a rational and allowable balancing of values by the elected representatives of the people.

In his contrary thesis, plaintiff proposes to stretch the constitutional dimensions of "privacy" far beyond any reasonably foreseeable limits the courts ought to enforce. His claim is in an area where there is no invidious discrimination, no problem of a wrong unreachable at the polls, no suggestion of an affliction confined to a relatively helpless minority. Cf. *Reynolds* v. *Sims*, 377 U.S. 533, 553 (1964); *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943). His alleged injury, shared with what is probably a majority of the electorate, results from a judgment by the State which appears to be well within its "vast leeway in the management of its internal affairs." *Sailors* v. *Board of Education*, — U.S. —, — (1967).

Of course, the fact that a claim is novel does not in itself brand it as unsubstantial. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 159 (Frankfurter, J., concurring). The non-mathematical task of the single judge in a case like this is to decide only whether

the contention has some plausible chance of success, arguably sufficient to warrant full-scale consideration in the Supreme Court on an appeal as of right from a three-judge district court. Perhaps "unsubstantiality" need not be so plain when a single judge dismisses as it should probably be when a single judge finds the *defense of constitutionality* frivolous (*Bailey* v. *Patterson, supra*) and then enjoins enforcement of the state statute. In the latter situation, the protection of three-judge deliberation is withheld though the case is squarely within the primary purpose of the scheme—"that a single judge ought not to be empowered to invalidate a state statute under a federal claim * * *." *Id.*, 369 U.S. at 33; and see *Green* v. *Board of Elections, supra*, — F.2d at —. But where, as in this case, a single judge finds the plaintiff's contentions plainly unsubstantial, the normally less major consequence of error is at most to postpone invalidation of the State's law. And that, in the circumstances of this case, is a bearable possibility.

For the reasons above stated, the motion to convene a three-judge court is denied. The motions to dismiss the complaint are granted. The complaint is dismissed.

So ordered.

Dated: New York, New York,
June 22, 1967.

MARVIN E. FRANKEL
U.S.D.J.

FOOTNOTES:

1. Plaintiff's motion papers also request a preliminary injunction, but it was stated upon argument that this application is not being pressed at this time, pending the ruling on whether a three-judge court is appropriate.

2. There is no allegation that plaintiff has demanded exclusion of his name from the list sold by the Commissioner. In response to the court's inquiry, the State Attorney General has taken the position that this is immaterial in any event. With that representation, the question is treated on the premise that such a demand by the plaintiff would have been futile.

3. Plainiff's Memorandum of Law, pp. 5-6.

4. Overruled in *Camara* v. *Municipal Court*, —— U.S. —— (1967).

5. Compare the Act of July 4, 1966, 80 Stat. 250, amending Section 3 of the Administrative Procedure Act to expand the availability of agency records and providing, *inter alia*, that "the burden shall be upon the agency to sustain its action" when it resists disclosure.

6. Cal. Vehicle Code Ann. § 1811 (West Supp. 1966); Conn. Gen. Stat. Rev. § 14-49(r) (1958); Fla. Stat. § 319.25 (5)(a) (1965); Ill. Rev. Stat. ch. 95 ½, § 3-418 (1959); Ind. Ann. Stat. § 47-2625 (Burns Replacement 1965); Mich. Comp. Laws Ann. § 257.232 (1967); Minn. Stat. Ann. § 168.33 Subd. 3 (1960); Mont. Rev. Codes Ann. § 53-101(8) (1947); Ohio Rev. Code Ann. § 4503.26 (Page 1965); Okla. Stat. Ann. tit. 47, § 22.24 (1962); Pa. Stat. Ann. tit. 75, § 417 (1960); S.C. Code Ann. § 46-120 (1962); Gen. & Special Laws of Texas Chap. 720 § 36 of H.B. 12 (59th Legislature 1965) and Minute Order of Texas Highway Commission pursuant thereto dated February 16, 1966; Utah Code Ann. §§ 41-1-60 (Supp. 1965), 41-1-61 (1953); Vt. Stat. Ann. tit. 23, § 109 (1959); Va. Code Ann. § 46. 1-32 (1967); W. Va. Code Ann. § 1721 (140) (1961); Wis. Stat. Ann. § 341.17 (Supp. 1967).

Defendant Polk, in an undisputed compilation of statutes which need not be reproduced here, reports its finding of provisions in every State except Kentucky making public records of vehicle registration information. The substantially uniform state practice is not decisive, but it is another item of some weight against plaintiff's constitutional theory. Cf. *McGowan* v. *Maryland*, 366 U.S. 420, 497 (1961) (opinion of Mr. Justice Frankfurter); *Green* v. *Board of Elections*, —— F.2d ——, —— (2d Cir. 1967).